82812-1

No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 61419-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ROBERT CARLILE, et ux., et al.,

Appellants,

v.

HARBOUR HOMES, INC., f/k/a GEONERCO, INC., a Washington corporation,

Respondent.

PETITION FOR REVIEW

By: Robert J. Curran, WSBA No. 14310
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I. INTRODUCTION AND IDENTITY OF PETITIONERS

Petitioners are ten sets of single family homeowners who purchased homes in Snohomish County, Washington constructed in 2001 and 2002 by Respondent Harbour Homes, Inc. (fka Geonerco, Inc). The homeowners are second purchasers of their homes; however, each holds a valid assignment of claims from the original purchasers, including all claims for breach of the implied warranty of habitability, intentional misrepresentation, and breach of the Washington Consumer Protection Act. At summary judgment, it was undisputed that the homes all suffer from substantial defects which allow water to penetrate behind the siding into the structure of the homes.

The Snohomish County Superior Court, the Honorable James Allendorfer presiding, dismissed the homeowners' claims at summary judgment in their entirety. The Court of Appeals, Division I, reversed in part, affirmed in part, and remanded for further proceedings. The Court of Appeals held the assignments were valid, and reversed dismissal of the CPA claims. However, dismissal of the implied warranty of habitability claims was affirmed, with the Court of Appeals holding for the first time that warranty of habitability claims may not be assigned as a matter of

law. The Court of Appeals also upheld the dismissal of the intentional misrepresentation claims on the grounds that the claims were barred by the economic loss rule. No other Washington decision holds that claims for intentional fraud are controlled by the economic loss rule.

II. COURT OF APPEALS DECISION

Petitioners seek review of the published decision from Division I of the Court of Appeals filed on October 20, 2008 in *Carlile v. Harbour Homes, Inc.*, ___ Wn. App. ___, 194 P.3d 280 (2008), under Case Number 61419-3-I, attached as Appendix A. Harbour Homes' motion for reconsideration was denied by Order Denying Motion for Reconsideration filed November 20, 2008, attached as Appendix B.

III. ISSUES PRESENTED FOR REVIEW

1. Whether a cause of action for breach of the implied warranty of habitability may be assigned by an original purchaser to his or her buyer when the law in Washington generally allows for assignment of claims and there is no public policy which would prevent assignment.

2. Whether the economic loss rule bars claims for intentional misrepresentation or fraud.

3. Whether the economic loss rule applies to intentional fraud claims held by second homeowners in their own right, when there is no contract between the parties.

IV. STATEMENT OF THE CASE

This lawsuit arises from the construction and sale by developer Harbour Homes, Inc. of ten single family homes in the Bluegrass Meadows development in Mill Creek, Washington. CP 186-201. The homes all share the same construction details and defects, which caused the homes to suffer from excessive moisture, degradation, and/or damage to building components. CP 85-88. These conditions were present from the time of the original construction. CP 88.

Harbour Homes' promotional and advertising materials represented the homes were "of the highest quality and workmanship," that "maintenance is kept to a minimum for many years due to the high quality of material and workmanship," and that the homes were inspected several times during construction by quality control managers. CP 104-105. Harbour Homes never disclosed that these statements were untrue, or that there were substantial defects in the homes. CP 65-76.

Thirty-seven homeowners filed suit against Harbour Homes for breach of the implied warranty of habitability, breach of contract, negligent and intentional misrepresentation, and violation of the Consumer Protection Act. CP 186-201. Of the 37 homeowners, 26 are the original owners of the homes and 11[1] are subsequent owners who owned claims by assignment from the original purchasers and in their own right for intentional misrepresentation. CP 98-101. The 26 original owners' claims were removed to arbitration, leaving the subsequent owners as the only plaintiffs in the superior court action. CP 49-52.

The subsequent homeowners each hold identical Assignments of Claims from their original owners. The original owners assigned "all claims arising out of tort, contract, statute or any other source, all causes of action, demands, and all rights to sue" for claims arising out of or related to the sale of their homes. CP 101. The assignments specifically included:

> all of Seller's claims, causes of action, demands and rights to sue Generco under any legal theory whatsoever arising out of Generco's ownership, development, construction, marketing and sale of Seller's former property in Bluegrass Meadows, the contract of sale or deed between any

[1] One of the subsequent homeowners non-suited by stipulation of the parties, leaving the current ten second homeowners whose claims are at issue in this appeal. CP 99.

> Generco entity and Seller, and all such Seller's claims, causes of action, demands, and rights to sue Generco held by Seller.

CP 101.

Harbour Homes filed for summary judgment on January 11, 2008, asserting that the assignments were invalid and that the claims could not be assigned as a matter of law. CP 166-181. The trial court granted the motion on February 12, 2008 dismissing all claims. CP 62-64. The homeowners appealed.

In a published opinion, Division I of the Court of Appeals affirmed in part, reversed in part, and remanded for further proceedings. The assignments were held to be valid. Appendix A at 11-13. The implied warranty of habitability claims were held to be non-assignable as a matter of law, and the intentional misrepresentation claims were held to be barred by the economic loss rule. *Id.* at 6-11. Dismissal of the CPA claim was reversed and the case was remanded on the CPA claim. *Id.* at 13-15. The homeowners seek review of the dismissal of the implied warranty of habitability and intentional misrepresentation claims only.

Harbour Homes filed a Motion for Reconsideration and Clarification, which the Court of Appeals denied on November 20, 2008.

Appendix B. This Petition for Review is timely pursuant to RAP 13.4(a) because it is filed within 30 days of the Order denying reconsideration.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The homeowners seek review of three issues: 1) can claims for breach of the implied warrant of habitability be assigned; 2) does the economic loss rule bar claims for common law fraud; and (3) does the economic loss rule apply to intentional misrepresentation claims when there is no contract between the parties. The first issue is a matter of first impression in Washington. In fact, the Court of Appeals decision appears to be the only appellate court decision in any jurisdiction holding that implied warranty of habitability claims may not be assigned. The second issue has been considered by this Court and by Division II of the Court of Appeals. Both courts declined to apply the economic loss rule to intentional fraud. The third issue is a clear error of law.

The implied warranty of habitability and the economic loss rule are evolving areas of the law and are of great public interest to homeowners and developers alike. Review by the Supreme Court is appropriate under RAP 13.4(b)(1), (2) & (4).

A. Assignment by contract of a cause of action for breach of the implied warranty of habitability is allowed by existing law, and is not barred by public policy.

Until the Court of Appeals decision in this case, no Washington appellate decision precluded assignment of an implied warranty of habitability claim. As the Court of Appeals acknowledged, causes of action are generally assignable in Washington.

> Contracts are assignable unless such assignment is expressly prohibited by statute, contract, or is in contravention of public policy. The traditional test for whether a cause of action is assignable is whether the claim would survive to the personal representative of the assignor upon death. If it would, the cause of action is assignable. A right of action arising from a contract is a chose in action and personal property.

Appendix A at 11; see also *Stover v. Winston Bros. Co.*, 185 Wash. 416, 429, 55 P.2d 821 (1936); RCW 4.20.046(1). The only limitations are on the right to recover for pain and suffering and emotional damages, which are not relevant here. *Woody's Olympia Lumber, Inc. v. Roney,* 9 Wn. App. 626, 633, 513 P.2d 849 (1973). Without explanation, the Court of Appeals declined to apply this standard to implied warranty of habitability claims, holding they could not be assigned as a matter of law.

In support of its ruling, the Court of Appeals relied upon the line of Washington decisions which hold that the implied warranty of habitability

arises from the sale of a new home by a builder/developer to its first intended occupant. Appendix A at 7-8; *see, e.g., Frickel v. Sunnyside Enterprises, Inc.*, 106 Wn.2d 714, 729-30, 725 P.2d 422 (1986); *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 415-16, 745 P.2d 1284 (1987). The Court also relied upon the fact that Washington does not recognize a cause of action for negligent construction. Appendix A at 8. The decision fails to explain, however, why a valid claim for breach cannot be assigned by contract, even if it would not automatically pass from one owner to another by operation of law.

> What is clear is that the supreme court and other courts in this state have consistently refused to expand liability of developers to those beyond the first purchasers of new homes. The fact that these homeowners are assignees of claims of the original homeowners does not alter our view that the result should be the same.

Id. at 8. Although the decision never states that it is based on public policy, that is presumably the case as no contractual or statutory basis for refusing to recognize the assignments is cited.

None of the decisions cited by the Court of Appeals address the issue of contractual assignment. The fact that the implied warranty only *arises* from the original sale, or that it will not pass to a subsequent

purchaser by operation of law, does not preclude assignment of a claim for breach by contract once the cause of action arises. *Cf. Highland Village Partners, LLC v. Bradbury & Stamm Const. Co., Inc.*, 195 P.3d 184, 187 (Ariz. Ct. of Appeals, 2008) *rev. denied* (Sept. 23, 2008) (fact that warranty does not pass automatically does not preclude assignment by contract). Similarly, the fact that Washington does not recognize a cause of action for negligent construction is immaterial to the question of whether a cause of action for breach of warranty may by assigned by contract. Nor is any decision cited, from any jurisdiction, which holds that assignment is against public policy. Accordingly, this decision is made without supporting or persuasive authority.

The prohibition against assignment also makes bad public policy. The implied warranty of habitability is based upon three important public policy grounds: (1) latent defects in a new home are "nearly impossible"[2] for prospective buyers to discover; (2) the builder/vendor is in a far better position to avoid defects than the buyer; and (3) the buyer of a new home has the right to expect that he or she will receive that which they bargained

[2] *Atherton Condominium Association v. Blume,* 115 Wn.2d 506, 521, 799 P.2d 250 (1990) (quoting *Christensen v R.D. Sell Constr. Co.*, 774 S.W.2d 535 (Mo. 1989)).

for—a habitable home.[3] These policies are of sufficient importance that a warranty of habitability is implied in every purchase and sale agreement for a new residence by a builder vendor.

The corollary to these policy concerns is that a cause of action for breach is an important property right. Like other causes of action, that property right should be assignable as a matter of law. In fact, causes of action are routinely assigned in construction defects cases as a means of resolving disputes, and holding parties responsible for their actions. There is no public policy reason why builder/vendors should enjoy special protection from assigned claims, or that original owners should be put to the Hobson's choice of litigating their claims, or letting them lapse if they are not personally able to litigate.

It should also be noted that the assignments in question only transfer the cause of action for breach, not the underlying warranty. Accordingly, the assignor stands in the shoes of the original owner, subject to all the defenses the defendant may have.[4] The liability of the

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[3] *Atherton*, 115 Wn.2d at 522.

[4] *Morse Electro Prods. Corp. v. Beneficial Indus. Loan Co.*, 90 Wn.2d 195, 198, 579 P.2d 1341 (1978) (an assignee stands in the shoes of the assignor); *Puget Sound Nat'l Bank v. Dep't of Revenue*, 123 Wn.2d 284, 292, 868 P.2d 127 (1994) (an assignee has all rights of the assignor).

builder/vendor is unchanged by the assignment. It is also well settled that a buyer can assign any contract claims he or she may have against the builder/vendor. *Berschauer/Phillips Construction. v. Seattle School Dist. 1*, 124 Wn.2d 816, 828, 881 P.2d 986 (1994). There is no principled reason why an implied warranty of habitability claim, which arises out of the purchase and sale agreement, should be handled differently.

In attempting to discern whether public policy precludes the assignment of an implied warranty of habitability claim, it should also be noted that this and numerous other jurisdictions provide for assignment by operation of law. The Washington Legislature has extended the implied warranty of suitability, which is coextensive with the warranty of habitability, to subsequent owners of a condominium for up to four years after the initial purchase. RCW 64.34.445(6). The majority of other states also extend the implied warranty of habitability to subsequent owners, limited only by a period of years. *See, e.g.*, *Richards v. Powercraft Homes, Inc.*, 678 P.2d 427, 430 (Ariz. 1984) ("[t]he purpose of a warranty is to protect innocent purchasers and hold builders accountable for their work . . . any reasoning which would arbitrarily interpose a first buyer as an obstruction to someone equally deserving of recovery is

incomprehensible"); *Redarowicz v. Ohlendorf*, 441 N.E.2d 324, 330 (Ill. 1976) ("The compelling public policies underlying the implied warranty of habitability should not be frustrated because of the short intervening ownership of the first purchaser."); *Terlinde v. Neely*, 271 S.E.2d 768, 769 (S.C. 1980) ("Common experience teaches that latent defects in a house will not manifest themselves for a considerable period of time, likely . . . after the original purchaser has sold the property to a subsequent unsuspecting buyer."); *see also Blagg v. Fred Hunt Co., Inc.*, 612 S.W.2d 321, 322 (1981); *Tusch Enterprises v. Coffin*, 740 P.2d 1022, 1035-36 (1987); *Speight v. Walters Dev. Co., Ltd.*, 744 N.W.2d 108 (Iowa 2008); *Keyes v. Guy Bailey Homes, Inc.*, 439 So.2d 670, 673 (Miss.1983); *Lempke v. Dagenais*, 547 A.2d 290 (N.H. 1988); *Hermes v. Staiano*, 437 A.2d 925 (N.J. Super 1981); *Elden v. Simmons*, 631 P.2d 739 (Okla.1981); *Nichols v. R.R. Beaufort & Associates, Inc.*, 727 A.2d 174 (R.I.1999); *Sewell v. Gregory*, 371 S.E.2d 82 (W. Va. 1988); *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo.1979). If the implied warranties of suitability and habitability can pass by operation of law in this and other states, assignment of an existing claim for breach cannot be against public

policy. Where reasonable minds can differ, or alternative approaches are recognized, public policy cannot compel but one result.

Review should also be granted because this case affects the public interest. No area of law is more intertwined with the public interest than housing. The implied warranty of habitability was created for public policy reasons. If assignment of a claim for breach is now to be restricted, it is appropriate that the Supreme Court decide the case, and determine if that if truly the course our jurisprudence should take.

B. The Court of Appeals decision applies the economic loss rule to intentional fraud for the first time, thereby restricting the victims of fraud to their contract remedies.

The Court of Appeals applied the economic loss rule to bar the assigned claims of the homeowners for intentional fraud by Harbour Homes. This holding conflicts with this Court's decision in *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), and Division II's decision in *Stieneke v. Russi*, 145 Wn. App. 544, 190 P.3d 60 (2008). The decision also conflicts with the majority of other jurisdictions and affects a matter of public interest. Accordingly, the Supreme Court should accept review under RAP 13.4(b)(1), (2) and (4).

In affirming dismissal of the homeowners' intentional misrepresentation claims, the Court of Appeals ruled as follows:

> The homeowners argue that the economic loss rule does not or should not apply to their assigned claim for intentional misrepresentation (fraud) because the rule does not apply to fraud claims. . . . The court in *Alejandre* recognized that fraudulent concealment claims are not precluded by the economic loss rule. But no Washington court has held that a claim for intentional misrepresentation (fraud) falls outside of the economic loss rule. The two tort claims have distinct elements. . . . Given the difference in elements between the two types of claims, there is no reason to conclude that an intentional misrepresentation claim should be treated the same as the fraudulent concealment claim in *Alejandre*. More importantly, there is no reason here to exempt an intentional misrepresentation claim from the general exclusion of tort-based claims under the rationale of the economic loss rule.

Appendix A at 9-10. Although fraudulent concealment is but a sub category of fraud, the Court of Appeals does not explain why fraudulent concealment and common law fraud should be treated differently for purposes of the economic loss rule, or why varying elements of the two fraud claims were significant.[5] The decision offers no explanation why the economic loss rule should be applied to intentional torts.

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[5] The elements of negligent misrepresentation and intentional fraud also differ, but that difference is not cited as a reason for disparate treatment. In fact, the two intentional torts are more alike than either one is to a negligence claim. In addition, Washington law has

In fact, the economic loss rule should not be applied to claims for intentional fraud. Contracting parties should not be required to anticipate that the other party will defraud them,[6] nor should they have to include anti fraud provisions within their contracts simply to preserve the protections which the law of fraud now ensures.[7]

The purpose of the economic loss rule does not apply to claims for fraud. As set forth in *Alejandre*, the economic loss rule seeks to preserve the fundamental boundaries between tort and contract law. 159 Wn.2d at 682. Tort law redresses "injuries properly classified as physical harm" and ensures that products and property do not "unreasonably endanger the safety and health of the public." *Id.* (quoting *Stuart v. Coldwell Banker Comm. Group. Inc,* 109 Wn.2d 406, 420-21, 745 P.2d 1284 (1987)). Contract law preserves the benefit of the bargain. *Id.* The difficulty is that a claim for intentional fraud protects against economic damages. The

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long equated a failure to disclose with an intentional misrepresentation, when there is a duty to disclose. *See, e.g.., Oates v. Taylor*, 31 Wn.2d 898, 902-03, 199 P.2d 924 (1948) (silence or concealment in violation of a duty to disclose is the equivalent of a falsehood and fraud); *Ikeda v. Curtis*, 43 Wn.2d 449, 460, 261 P.2d 684 (1953) (concealment of a fact which one is bound to disclose differs from a direct false statement only in the way it was made); *Boonstra v. Stevens-Norton, Inc.*, 64 Wn.2d 621, 624,393 P,2d 287 (1964) (suppression of a material fact a party is bound to disclose is equivalent to a false representation).

victims of fraud are not physically harmed and their property is not damaged. Fraudulent activity intentionally deprives a victim of money or property, an activity which contract law is ill equipped to address.

Similarly, the policies underlying the economic loss rule, as stated in *Alejandre*, do not justify excluding claims for fraud. 159 Wn.2d at 682-84. The need for certainty or to limit extended liability is outweighed by the needs of the defrauded victim. Moreover, parties control their intentional acts and, therefore, their potential liability. Allocation of risk between contracting parties is not an issue because risk requires an element of fortuity, and intentional acts are not fortuitous. Nor is there a valid concern that a party will receive a benefit beyond his bargain if a party is held liable for their intentionally fraudulent acts. Even if this were theoretically possible, the policy of making the victim of fraud whole is more important than the integrity of a bargain tainted with fraud.

The Court of Appeals decision is also contrary to this Court's decision in *Alejandre* and Division II's decision in *Steineke v. Russi*, 145 Wn. App. 544, 190 P.3d 60 (2008). Both decisions discuss the economic

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[6] *See generally*, Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 Wm. & Mary L. Rev. 1789, 1030 n. 260 (2000).

loss rule at length and apply the rule to claims for negligent misrepresentation. Both decisions also declined to apply the rule to common law fraud claims and instead decided those claims on the merits. As this Court noted in *Alejandre*, other jurisdictions have applied bright line tests which exclude intentional torts from the economic loss rule or limit its application. 159 Wn.2d at 685 n. 3. To resolve the apparent conflict with *Alejandre* and *Steineke*, and to better define the limits of the economic loss rule, this Court should accept review.

Finally, the application of the economic loss rule to intentional torts is a matter of public interest. Tort law has traditionally protected the victims of intentionally fraudulent acts. In this era of rampant investment fraud, almost all of which will involve an underlying contract, tort law is better equipped to handle the varied fact patterns fraud may take than is contract law. Barton, 41 Wm. & Mary L. Rev. 1789, 1830-38. The issue is not freedom to contract, but of minimally acceptable standards of conduct. The benefit of the bargain is defined by contract, but the right to seek redress for fraud has long been "imposed by law, rather than by bargain." *Alejandre*, 159 Wn.2d at 682. This balance has served us well

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[7] *See, e.g., All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 867 (7th Cir. 1999).

and should not be cast aside by a misguided application of the economic loss rule.

C. The Court of Appeal erroneously applied the economic loss rule to claims held by the homeowners in their own right.

Washington law recognizes that a party who makes a fraudulent misrepresentation is subject to liability to the class of persons whom he intends or has reason to expect to act or to refrain from acting in reliance upon the misrepresentation, even though they are not in privity. *Haberman v. Washington Public Power Supply System*, 109 Wash.2d 107, 167, 744 P.2d 1032 (1987). Accordingly, the second homeowners hold their own claims against Harbour Homes for intentional misrepresentation which were improperly dismissed at summary judgment and on appeal.[8]

Washington courts have consistently applied the economic loss rule only when there is a contract. As this Court stated in *Alejandre*:

> The purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses. If the economic loss rule applies, the party will be held to contract remedies . . .

[8] "The homeowners also argue that summary judgment was improper because the economic loss rule does not apply . . . to the claims of subsequent homeowners who did not contract with the builder. We disagree." Appendix A at 8.

159 Wn.2d at 683 (emphasis added); *see also Berschauer/Phillips Constr. v. Seattle School Dist. 1*, 124 Wn.2d 816, 828, 881 P.2d 986 (1994) ("when parties have contracted to protect against potential economic liability . . . purely economic damages are not recoverable"). All three divisions of the Court of Appeals agree. *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 213, 969 P.2d 486 (1998) (Division I: economic loss rule applies "when a contract allocates liability"); *Stieneke*, 145 Wn. App. at 556 (Division II: where the parties have entered into a contractual relationship, and merely economic losses occur, the economic loss rule bars tort remedies); *Baddeley v. Seek*, 138 Wn. App. 333, 339, 156 P.3d 959 (2007) (Division III: since no contractual relationship exists between the parties, the economic loss rule does not apply).

The Court of Appeals decision in this case dismissing the direct claims of the homeowners based upon the economic loss rule conflicts with the decisions of this Court and all three Divisions. The decision is in error and should be reversed. Review should therefore be taken under RAP 13.4(b)(1) & (2).

VI. CONCLUSION

The Supreme Court should accept review for the reasons set forth

in Section V. The decision of the Court of Appeals regarding assignment of the implied warranty of habitability and application of the economic loss rule to intentional fraud should be reversed, the court should hold that both claims were properly assigned, and the case should be remanded to superior court for trial on the implied warranty of habitability, international misrepresentation and Consumer Protection Act claims.

RESPECTFULLY SUBMITTED this 19th day of December, 2008.

RYAN, SWANSON & CLEVELAND, PLLC

By _____
Robert J. Curran, WSBA No. 14310
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CERTIFICATE OF SERVICE

This is to certify that on December 19, 2008, a copy of this Petition for Review was served on the following counsel and parties as noted below to the following addresses:

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DATED this 19th day of December, 2008.

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By _____
Robert J. Curran, WSBA No. 14310
Britenae Pierce, WSBA #34032
Attorneys for Appellants

APPENDIX

H

Court of Appeals of Washington, Division 1.
Robert **CARLILE** and Angie **Carlile**, husband and wife and their marital community; et al., Appel- lants,
v.
HARBOUR HOMES, INC. f/k/a Geonerco, Inc., a Washington corporation, Respondent.
No. 61419-3-I.

Oct. 20, 2008.
Reconsideration Denied Nov. 20, 2008.

Background: Original or subsequent purchasers of newly-constructed homes brought claims against builder-vendor for breach of implied warranty of habitability, misrepresentation, breach of contract, and violation of Consumer Protect Act (CPA), relating to alleged construction defects. After compelling arbitration of claims by original purchasers, the Superior Court, Snohomish County, James H. Allendoerfer, J., granted defendant's motion for summary judgment and certified the summary judgment order for appeal.

Holdings: The Court of Appeals, Cox, J., held that:
(1) claims for breach of implied warranty of habitability could not be asserted by subsequent purchasers as assignees of original purchasers;
(2) economic loss rule applies to claims for intentional misrepresentation;
(3) causes of action under the Consumer Protection Act could be assigned; and
(4) fact issues regarding causation precluded summary judgment on Consumer Protection Act claims.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Assignments 38 ⇐18

38 Assignments
38I Property, Estates, and Rights Assignable
38k17 Executory Contracts
38k18 k. In General. Most Cited Cases
Generally, contract rights may be freely assigned unless forbidden by statute or rendered ineffective for public policy reasons.

[2] Contracts 95 ⇐205.35(2)

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k205 Warranties
95k205.35 Sale of Dwellings; Habitability
95k205.35(2) k. New Buildings; Sales by Builders and Commercial Activity. Most Cited Cases
The doctrine of implied warranty of habitability protects the first occupants of residential property against the risk of fundamental defects in the structure of a home.

[3] Contracts 95 ⇐188.5(3)

95 Contracts
95II Construction and Operation
95II(B) Parties
95k188.5 Warranties, Rights and Liabilities of Third Persons
95k188.5(3) k. Successors in Interest; Subsequent Buyers. Most Cited Cases
Claims for breach of implied warranty of habitability, relating to alleged construction defects in homes constructed and sold by builder-vendor, could not be asserted by subsequent purchasers as assignees of original purchasers who were the original occupants of the homes.

[4] Torts 379 ⇐118

379 Torts
379I In General
379k116 Injury or Damage from Act
379k118 k. Economic Loss Doctrine.

Appendix A

Most Cited Cases
The economic loss rule holds parties to their contract remedies, when a loss potentially implicates both tort and contract relief.

[5] Torts 379 ⚷118

379 Torts
379I In General
379k116 Injury or Damage from Act
379k118 k. Economic Loss Doctrine. Most Cited Cases
The economic loss rule prohibits plaintiffs from recovering, in tort, economic losses to which their entitlement flows only from contract, because tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement.

[6] Fraud 184 ⚷25

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k25 k. Injury and Causation. Most Cited Cases
The economic loss rule, which prohibits plaintiffs from recovering, in tort, economic losses to which their entitlement flows only from contract, applies not only to tort claims for negligent misrepresentation, but also to tort claims for intentional misrepresentation.

[7] Fraud 184 ⚷16

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k15 Fraudulent Concealment
184k16 k. In General. Most Cited Cases
A claim for fraudulent concealment, by the purchaser of a home, requires the purchaser to show: (1) the residential dwelling has a concealed defect; (2) the vendor had knowledge of the defect; (3) the defect presents a danger to the property, health, or life of the purchaser; (4) the defect was unknown to the purchaser; and (5) the defect would not be disclosed by a careful, reasonable inspection by the purchaser.

[8] Fraud 184 ⚷3

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k2 Elements of Actual Fraud
184k3 k. In General. Most Cited Cases
The elements of intentional misrepresentation are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon the representation; and (9) damages suffered by plaintiff.

[9] Fraud 184 ⚷13(3)

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k8 Fraudulent Representations
184k13 Falsity and Knowledge Thereof
184k13(3) k. Statements Recklessly Made; Negligent Misrepresentation. Most Cited Cases

Fraud 184 ⚷21

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k19 Reliance on Representations and Inducement to Act
184k21 k. Persons Who May Rely on Representations. Most Cited Cases
Even assuming that economic loss rule would not preclude subsequent purchasers of newly-constructed homes from bringing claims against builder-vendor for negligent misrepresentation, relating to economic losses from construction defects,

builder-vendor was not liable to subsequent purchasers for negligent misrepresentation, in absence of evidence that builder-vendor made representations directly to subsequent purchasers, that subsequent purchasers knew about representations made to original purchasers, or that subsequent purchasers justifiably relied on any such representations.

[10] Assignments 38 ⚷22

38 Assignments
38I Property, Estates, and Rights Assignable
38k21 Rights of Action
38k22 k. In General. Most Cited Cases
The traditional test for whether a cause of action is assignable is whether the claim would survive to the personal representative of the assignor upon death; if it would, the cause of action is assignable.

[11] Property 315 ⚷5.5

315 Property
315k5.5 k. Choses or Rights in Action. Most Cited Cases
A right of action arising from a contract is a chose in action and personal property.

[12] Assignments 38 ⚷31

38 Assignments
38II Mode and Sufficiency of Assignment
38k31 k. Nature and Essentials in General. Most Cited Cases
No particular words of art are required to create a valid and binding assignment; any language showing the owner's intent to transfer and invest property in the assignee is sufficient.

[13] Assignments 38 ⚷90

38 Assignments
38V Rights and Liabilities
38k90 k. Nature and Extent of Rights of Assignee in General. Most Cited Cases
An assignee steps into the shoes of the assignor, and has all of the rights of the assignor.

[14] Assignments 38 ⚷23

38 Assignments
38I Property, Estates, and Rights Assignable
38k21 Rights of Action
38k23 k. On Contract. Most Cited Cases
Causes of action for breach of contract which original purchasers of newly-constructed homes had against builder-vendor, relating to alleged construction defects, were personal property, and thus, the causes of action could be assigned by original purchasers to subsequent purchasers after the original purchasers sold the homes to the subsequent purchasers.

[15] Assignments 38 ⚷54

38 Assignments
38II Mode and Sufficiency of Assignment
38k53 Consideration
38k54 k. Necessity. Most Cited Cases
Consideration, for the assignment of a chose of action, is not required, in order for the assignment to be valid. West's RCWA 4.08.080.

[16] Assignments 38 ⚷26

38 Assignments
38I Property, Estates, and Rights Assignable
38k21 Rights of Action
38k26 k. Founded on Statute. Most Cited Cases
Causes of action, under the Consumer Protection Act (CPA), that original purchasers of newly-constructed homes had against the builder-vendor could be assigned to subsequent purchasers. West's RCWA 19.86.010 et seq.

[17] Assignments 38 ⚷58

38 Assignments
38II Mode and Sufficiency of Assignment
38k58 k. Consent of Debtor. Most Cited Cases
General anti-assignment clauses in contracts, aimed at prohibiting the assignment of contractual performance, will not be construed to prohibit assign-

ments of a breach of contract cause of action unless the contract contains specific language to the contrary.

[18] Antitrust and Trade Regulation 29T 134

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk133 Nature and Elements
29Tk134 k. In General. Most Cited Cases
In order to maintain a private Consumer Protection Act (CPA) action, a plaintiff must establish five elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) a causal link between the unfair or deceptive acts and the injury suffered by plaintiff. West's RCWA 19.86.020.

[19] Antitrust and Trade Regulation 29T 363

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)5 Actions
29Tk361 Proceedings; Trial
29Tk363 k. Questions of Law or Fact. Most Cited Cases
Whether an alleged act is unfair or deceptive, for purposes of the Consumer Protection Act (CPA), is a question of law. West's RCWA 19.86.020.

[20] Antitrust and Trade Regulation 29T 136

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk133 Nature and Elements
29Tk136 k. Fraud; Deceit; Knowledge and Intent. Most Cited Cases
Under the Consumer Protection Act (CPA), an unfair or deceptive act or practice need not be intended to deceive; it need only have the capacity to deceive a substantial portion of the public. West's RCWA 19.86.020.

[21] Antitrust and Trade Regulation 29T 198

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regula- tions
29Tk198 k. Real Property in General. Most Cited Cases
A vendor's failure to disclose material facts to the purchaser in a real estate transaction may support a Consumer Protection Act (CPA) claim, even if the circumstances do not establish fraudulent concealment. West's RCWA 19.86.010 et seq.

[22] Antitrust and Trade Regulation 29T 138

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk133 Nature and Elements
29Tk138 k. Reliance; Causation; Injury, Loss, or Damage. Most Cited Cases
To establish the causation element of a Consumer Protection Act (CPA) claim, a plaintiff must show that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury. West's RCWA 19.86.020.

[23] Negligence 272 1713

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts

272k1712 Proximate Cause
272k1713 k. In General. Most Cited Cases
Proximate cause is a factual question to be decided by the trier of fact.

[24] Judgment 228 ⚿181(29)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(29) k. Sales Cases in General. Most Cited Cases
Genuine issues of material fact as to causation precluded summary judgment for defendant builder-vendor of homes, in action under Consumer Protection Act (CPA) by plaintiff subsequent purchasers as assignees of original purchasers' CPA claims, which claims related to alleged construction defects in homes allegedly marketed with affirmative representations of high quality and workmanship. West's RCWA 19.86.020.

[25] Contracts 95 ⚿168

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k168 k. Terms Implied as Part of Contract. Most Cited Cases
The duty of good faith and fair dealing is implied in every contract.

[26] Contracts 95 ⚿168

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k168 k. Terms Implied as Part of Contract. Most Cited Cases
The implied duty of good faith and fair dealing obligates the contracting parties to cooperate with each other so that each may obtain the full benefit of performance.

[27] Contracts 95 ⚿168

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k168 k. Terms Implied as Part of Contract. Most Cited Cases
The implied duty of good faith and fair dealing does not inject substantive terms into the parties' contract; rather, it requires only that the parties perform in good faith the obligations imposed by their agreement.

[28] Contracts 95 ⚿168

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k168 k. Terms Implied as Part of Contract. Most Cited Cases
The implied duty of good faith and fair dealing exists only in relation to performance of a specific contract term.

[29] Contracts 95 ⚿205.35(2)

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k205 Warranties
95k205.35 Sale of Dwellings; Habitability
95k205.35(2) k. New Buildings; Sales by Builders and Commercial Activity. Most Cited Cases
Builder-vendor was not liable to subsequent purchasers of homes, as assignees of original purchasers' contractually-based causes of action, for breach of implied covenant of good faith and fair dealing, relating to alleged construction defects in the homes, in absence of evidence that builder-vendor failed to perform in good faith in relation to specific contractual terms regarding construction according to certain plans and representations of quality.

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COX, J.

¶ 1 At issue in this case is whether 10 sets of subsequent homeowners may sue the developer of residential property for breach of the implied warranty of habitability, misrepresentation, breach of contract, and Consumer Protect Act (CPA) violations. Notwithstanding the assignments of claims from the original purchasers to these homeowners, we hold they cannot sue the developer for breach of the implied warranty of habitability. The economic loss rule bars both the negligent and the intentional misrepresentation claims asserted here. The claims based on breach of the duty of good faith and fair dealing are not substantiated in this record. But there are genuine issues of material fact whether the developer's acts were the cause of the claimed damages under the CPA. We affirm in part, reverse in part, and remand.

¶ 2 This case arises from alleged construction defects in the Harbour Homes, Inc. Bluegrass Meadows development in Snohomish County. Harbour Homes built the homes at issue between 2000 and 2003. In August 2007, 37 plaintiffs sued Harbour Homes, alleging that their homes contained construction defects. They alleged breach of the implied warranty of habitability, breach of contract (implied covenant of good faith and fair dealing), negligent and/or intentional misrepresentation, and violations of the Consumer Protection Act.

¶ 3 Of the 37 plaintiffs initially named in this action, 11 purchased their homes from sellers who had purchased new homes directly*283 from Harbour Homes. These 11 subsequent homeowners ("the homeowners") obtained assignments of all claims from those original purchasers. Harbour Homes moved to compel arbitration of the claims of those plaintiffs who purchased homes directly from it. The trial court granted that motion.

¶ 4 Apparently, there was no basis for arbitrating the claims of the remaining plaintiffs. Accordingly, the homeowners' claims remained to be tried.

¶ 5 Harbour Homes then moved for summary judgment against the homeowners. One homeowner nonsuited by stipulation of the parties, leaving the current 10 homeowners whose claims are at issue on appeal.

¶ 6 The court granted the motion, dismissing all claims. The trial court also granted the homeowners' motion for CR 54(b) certification of the summary judgment order.

¶ 7 The homeowners appeal.

IMPLIED WARRANTY OF HABITABILITY

¶ 8 The homeowners argue that the trial court erred in dismissing their cause of action for breach of the implied warranty of habitability on summary judgment because such claims are assignable as a matter of law. We disagree.

¶ 9 A motion for summary judgment may be granted when there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law.[FN1] We review a summary judgment order de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party.[FN2]

FN1. CR 56(c).

FN2. *Khung Thi Lam v. Global Med. Sys.*, 127 Wash.App. 657, 661 n. 4, 111 P.3d 1258 (2005).

[1][2] ¶ 10 Generally, contract rights may be freely assigned unless forbidden by statute or rendered ineffective for public policy reasons.[FN3] In Washington, the doctrine of implied warranty of habitability protects the first occupants of residential property against the risk of fundamental defects in the structure of a home.[FN4]

FN3. *Federal Financial Co. v. Gerard,* 90 Wash.App. 169, 177, 949 P.2d 412 (1998).

FN4. *Stuart v. Coldwell Banker Commercial Group, Inc.,* 109 Wash.2d 406, 416, 745 P.2d 1284 (1987).

¶ 11 Washington adopted the implied warranty of habitability in *House v. Thornton.*[FN5] In *House*, a builder-vendor constructed a house on an unstable site, resulting in severe deterioration of the foundation.[FN6] The court held the builder liable, defining the implied warranty rule as follows:

FN5. 76 Wash.2d 428, 436, 457 P.2d 199 (1969).

FN6. *Id.* at 429-31, 457 P.2d 199.

> We apprehend it to be the rule that, when a vendor-builder sells a new house to its first intended occupant, he impliedly warrants that the foundations supporting it are firm and secure and that the house is structurally safe for the buyer's intended purpose of living in it. Current literature on the subject overwhelmingly supports this idea of an implied warranty of fitness in the sale of new houses.[FN7]

FN7. *Id.* at 436, 457 P.2d 199.

¶ 12 Later cases have upheld the rule's application only to first purchaser-occupants. In *Klos v. Gockel,*[FN8] the builder lived in the house for a year before selling it to the plaintiffs, who then sued under the warranty of habitability for damage from a mud slide. In holding the damage insufficient to invoke the warranty, the court noted that "for purposes of warranty liability, the house purchased must be a 'new house.' " [FN9]

FN8. 87 Wash.2d 567, 554 P.2d 1349 (1976).

FN9. *Id.* at 571, 554 P.2d 1349.

¶ 13 In *Gay v. Cornwall,*[FN10] the implied warranty applied because plaintiffs were the first occupants of the house (although they were its third owners). The court held, "in the instant situation, privity between plaintiff and defendant builder is not a prerequisite to imposing liability on a builder whose completed product is unfit for the purpose contemplated***284** by the parties." [FN11] But the court also made clear that it was discussing situations of "brand-new housing." [FN12]

FN10. 6 Wash.App. 595, 494 P.2d 1371 (1972).

FN11. *Id.* at 597, 494 P.2d 1371.

FN12. *Id.*

¶ 14 In *Frickel v. Sunnyside Enterprises, Inc.,*[FN13] several dissenting justices lamented the fact that Washington's implied warranty applies only to original purchaser-occupants. In urging extension of the warranty, three justices noted that insulating builders from liability on the grounds that damage may be caused by intervening tenants was "unsupportable" where the defects were latent, and that an extension of the warranty to subsequent purchasers would not involve unlimited liability for the builders because the warranty would only apply for the statutory six-year statute of repose.[FN14] The majority did not adopt this position.

FN13. 106 Wash.2d 714, 725 P.2d 422 (1986) (court declined to extend implied warranty of habitability to sale of apartment complex despite serious foundation defects and improper construction, where property was not built for resale and sales contract contained express disclaimers of such warranty).

FN14. *Frickel,* 106 Wash.2d at 729-30, 725 P.2d 422.

¶ 15 The court's rejection of this view was made clear when it decided *Stuart v. Coldwell Banker Commercial Group, Inc.,*[FN15] the following year. The court cited *Frickel* as support for its observa-

tion that "[t]his court has not been anxious to extend the implied warranty of habitability beyond its present boundaries." [FN16] Refusing to recognize a cause-of action for negligent construction, the court stated:

> FN15. 109 Wash.2d 406, 745 P.2d 1284 (1987).
>
> FN16. *Id.* at 416, 745 P.2d 1284.

> Imposition of tort liability upon the builder-vendors would require them to become the guarantors of the complete satisfaction of future purchasers. A builder-vendor could contract to limit [his] liability for defects with the original purchaser and then find themselves [sic] liable for the same defects to a future purchaser with whom they had absolutely no contact.[FN17]
>
> FN17. *Id.* at 421, 745 P.2d 1284.

Subsequent cases have adhered to this rule.[FN18]

> FN18. *See, e.g., Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.,* 115 Wash.2d 506, 526-27, 799 P.2d 250 (1990) (Homeowner's negligent construction claim barred because "the only recognized duty owing from a builder-vendor of a newly completed residence to its first purchaser is that embodied in the implied warranty of habitability, which arises from the sale transaction.").

¶ 16 Here, the homeowners contend that their implied warranty claim was proper because the original owners (the first purchaser-occupants) assigned their implied warranty claims to them. They assert that the majority of other states have extended the implied warranty of habitability to subsequent owners, limited only by a period of years. They argue that the assignment of such claims does not extend a builder-vendor's liability because the assignee merely stands in the shoes of the assignor, subject to all original defenses.

[3] ¶ 17 We are not persuaded by the suggestion that other states have allowed those other than the first purchasers from a developer to recover on claims based on the implied warranty of habitability.[FN19] What is clear is that the supreme court and other courts in this state have consistently refused to expand liability of developers to those beyond the first purchasers of new homes. The fact that these homeowners are assignees of claims of the original homeowners does not alter our view that the result should be the same. Under *Stuart* and other precedent, the trial court correctly ruled that the implied warranty of habitability does not apply to these homeowners, who are assignees of the first purchasers from the developer.

> FN19. *See* Michael A. DiSabatino, Annotation, *Liability of Builder of Residence for Latent Defects Therein as Running to Subsequent Purchasers from Original Vendee,* 10 A.L.R.4th 385 (1981 & Supp.2007) (noting that courts of different states have taken different positions as to whether an implied warranty of merchantability or habitability should extend from a builder to remote purchasers with whom the builder has no contractual privity).

*285 ECONOMIC LOSS RULE

¶ 18 The homeowners also argue that summary judgment was improper because the economic loss rule does not apply to intentional fraud claims or to the claims of subsequent homeowners who did not contract with the builder. We disagree.

[4][5] ¶ 19 The economic loss rule applies to hold parties to their contract remedies when a loss potentially implicates both tort and contract relief.[FN20] The rule "prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from contract" because "tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement." [FN21]

FN20. *Alejandre v. Bull,* 159 Wash.2d 674, 681, 153 P.3d 864 (2007).

FN21. *Id.* at 681-82, 153 P.3d 864 (internal quotations omitted) (citing *Factory Mkt., Inc. v. Schuller Int'l, Inc.,* 987 F.Supp. 387, 395 (E.D.Pa.1997)).

¶ 20 In *Alejandre v. Bull,*[FN22] our supreme court held that a homebuyer's negligent misrepresentation tort claim against the seller was precluded under the economic loss rule.[FN23] The court explained, "[i]f the claimed loss is an economic loss and no exception applies to the economic loss rule, then the parties will be limited to contractual remedies." [FN24] The injury complained of in *Alejandre* was a failed septic system.[FN25] The court characterized this as "[p]urely economic damages" because defects evidenced by internal deterioration are characterized as economic losses.[FN26]

FN22. 159 Wash.2d 674, 153 P.3d 864 (2007).

FN23. *Id.* at 689, 153 P.3d 864.

FN24. *Id.* at 684, 153 P.3d 864.

FN25. *Id.* at 685, 153 P.3d 864.

FN26. *Id.* (citing *Stuart,* 109 Wash.2d at 420, 745 P.2d 1284 ("Defects of quality are evidenced by internal deterioration, and designated as economic loss, while loss stemming from defects that cause accidents involving violence or collision with external objects is treated as physical injury.")).

¶ 21 Here, the claimed injuries all relate to defects of internal deterioration of the homes. As in *Alejandre* and the cases on which it relies, purely economic damages are at issue here. As assignees, the economic loss rule precludes the homeowners from recovering in tort.

[6] ¶ 22 The homeowners argue that the economic loss rule does not or should not apply to their assigned claim for intentional misrepresentation (fraud) because the rule does not apply to fraud claims. They concede that their assigned claim for negligent misrepresentation fails under *Alejandre.* but rely on the same case to argue that the rule should not bar recovery for intentional misrepresentation.

[7][8] ¶ 23 The court in *Alejandre* recognized that fraudulent concealment claims are not precluded by the economic loss rule.[FN27] But no Washington court has held that a claim for intentional misrepresentation (fraud) falls outside of the economic loss rule. The two tort claims have distinct elements. A claim for fraudulent concealment requires a plaintiff to show:

FN27. *Alejandre,* 159 Wash.2d at 689, 153 P.3d 864 (citing *Atherton,* 115 Wash.2d at 523-27, 799 P.2d 250).

(1) [that] the residential dwelling has a concealed defect; (2) the vendor has knowledge of the defect; (3) the defect presents a danger to the property, health, or life of the purchaser; (4) the defect is unknown to the purchaser; and (5) the defect would not be disclosed by a careful, reasonable inspection by the purchaser.[FN28]

FN28. *Id.*

The nine elements of intentional misrepresentation (fraud) are:

(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon the representation; and (9) damages suffered by the plaintiff.[FN29]

FN29. *West Coast, Inc. v. Snohomish County,* 112 Wash.App. 200, 206, 48 P.3d

997 (2002).

***286** Given the difference in elements between the two types of claims, there is no reason to conclude that an intentional misrepresentation claim should be treated the same as the fraudulent concealment claim in *Alejandre.* More importantly, there is no reason here to exempt an intentional misrepresentation claim from the general exclusion of tort-based claims under the rationale of the economic loss rule.

¶ 24 Although the homeowners cite to *Baddeley v. Seek,*[FN30] a Division Three case, and *Stieneke v. Russi,*[FN31] from Division Two, for support of their argument, neither court expressly decided that intentional misrepresentation and fraud claims fall outside the scope of the economic loss rule. The court in *Baddeley* did not reach the question of whether the economic loss rule bars fraud claims in Washington.[FN32] Instead, it held that the plaintiffs' intentional misrepresentation claims failed because they failed to show all of the necessary elements of fraud.[FN33]

FN30. 138 Wash.App. 333, 156 P.3d 959 (2007).

FN31. 145 Wash.App. 544, 190 P.3d 60 (2008).

FN32. *Baddeley,* 138 Wash.App. at 338-39, 156 P.3d 959.

FN33. *Id.* at 339, 156 P.3d 959.

¶ 25 In *Stieneke.* Division Two denied a claim for negligent misrepresentation under the economic loss rule and *Alejandre* but still considered the merits of a fraud claim.[FN34] The *Stieneke* court did not expressly consider the potential barring effect of the economic loss rule on the fraud claim. Thus, the case is not helpful here.

FN34. *Stieneke,* 145 Wash.App. 544, 559-65, 190 P.3d 60 (2008).

¶ 26 Because we have no basis to depart from the application of the economic loss rule here, we conclude that the trial court properly dismissed this claim.

¶ 27 Additionally, the homeowners argue that the economic loss rule does not bar their direct (non-assigned) claim for negligent misrepresentation because they had no contractual privity with Harbour Homes as to this direct claim. They cite to section 552 of the Restatement (Second) of Torts for support.

¶ 28 The supreme court addressed similar arguments in *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1.*[FN35] In that case, the court considered claims brought by a general contractor against the architects and engineers of a construction project. The contractor asserted claims as an assignee of the project's owner and in its own right. The court barred the claims under the economic loss rule, specifically discussing the contractor's direct claim:

FN35. 124 Wash.2d 816, 881 P.2d 986 (1994).

Alternatively, Berschauer/Phillips requests that this court apply the Restatement (Second) of Torts § 552 (1977) to permit a general contractor not in privity of contract to bring a tort cause of action against a design professional for negligent misrepresentations. We acknowledge that § 552 provides support for the recovery of economic damages in the construction industry for negligent misrepresentations. The Restatement is equivocal in its support however. We also acknowledge that the tort of negligent misrepresentation is recognized in Washington. We hold that when parties have contracted to protect against potential economic liability, as is the case in the construction industry, contract principles override the tort principles in § 552 and, thus, purely economic damages are not recoverable.

There is a beneficial effect to society when

contractual agreements are enforced and expectancy interests are not frustrated. In cases involving construction disputes, the contracts entered into among the various parties shall govern their economic expectations.[FN36]

FN36. *Id.* at 827-28, 881 P.2d 986 (citations omitted).

[9] ¶ 29 In any event, the homeowners here have failed to articulate a cognizable negligent misrepresentation claim. They have not demonstrated what, if any, duty Harbour Homes owed to them. The record does not show that Harbour Homes made any representations directly to the homeowners, that the homeowners knew about the representations made to the original purchasers,***287** or that the homeowners justifiably relied on Harbour Homes's information.

¶ 30 Because we affirm the summary judgment dismissing these claims on the bases discussed, we need not reach Harbour Homes's other arguments.

ASSIGNMENT OF CLAIMS

¶ 31 Harbour Homes argues that all of the homeowners' assigned claims are invalid. We disagree.

[10][11] ¶ 32 Contracts are assignable unless such assignment is expressly prohibited by statute, contract, or is in contravention of public policy.[FN37] The traditional test for whether a cause of action is assignable is whether the claim would survive to the personal representative of the assignor upon death.[FN38] If it would, the cause of action is assignable.[FN39] A right of action arising from a contract is a chose in action and personal property.[FN40]

FN37. *Id.* at 829, 881 P.2d 986.

FN38. *Cooper v. Runnels,* 48 Wash.2d 108, 110, 291 P.2d 657 (1955).

FN39. *Harvey v. Cleman,* 65 Wash.2d 853, 855, 400 P.2d 87 (1965); *Woody's Olympia Lumber, Inc. v. Roney,* 9 Wash.App. 626, 633, 513 P.2d 849 (1973).

FN40. *Ennis v. Ring,* 49 Wash.2d 284, 289, 300 P.2d 773 (1956); *see also Mueller v. Rupp,* 52 Wash.App. 445, 450-51, 761 P.2d 62 (1988) ("A chose in action is personal property.").

[12][13] ¶ 33 No particular words of art are required to create a valid and binding assignment.[FN41] Any language showing the owner's intent to transfer and invest property in the assignee is sufficient.[FN42] An assignee "steps into the shoes of the assignor, and has all of the rights of the assignor." [FN43]

FN41. *Amende v. Town of Morton,* 40 Wash.2d 104, 106, 241 P.2d 445 (1952).

FN42. *Id.*

FN43. *Puget Sound Nat. Bank v. State Dep't of Revenue,* 123 Wash.2d 284, 292, 868 P.2d 127 (1994).

[14] ¶ 34 Because causes of action are personal property, the original purchasers here retained their legal interests in the claims against Harbour Homes up until the time they expressly assigned the claims to the homeowners. Harbour Homes has cited no authority to suggest that CPA or other claims arising from construction defects require continued ownership of the underlying real property.

¶ 35 Harbour Homes asserts that the original purchasers' assignments to the homeowners are invalid because the original owners had no present legal interest in the homes when the assignments were executed. But Harbour Homes fails to distinguish between the original purchasers' present legal interest in the **homes** when the assignments were executed and the original purchasers' present legal interest in any **claims** they had against Harbour Homes.

¶ 36 Relying on *Robbins v. Hunts Food & Indus., Inc.*[FN44] Harbour Homes argues that claims involving "personal confidence" are an exception to the general assignability of claims.[FN45]But the issue in *Robbins* was whether an executory sales contract making one party the exclusive sales agent of the other could be assigned. The court noted the personal confidence exception, but found that it did not apply where there was no evidence the contract was based "upon the business and financial skill, judgment, and credit" of the assignor.[FN46]

FN44. 64 Wash.2d 289, 391 P.2d 713 (1964).

FN45. Brief of Respondent at 10 (quoting *Robbins,* 64 Wash.2d at 294, 391 P.2d 713).

FN46. *Robbins,* 64 Wash.2d at 294-95, 391 P.2d 713.

¶ 37 Here, unlike *Robbins,* the assignments at issue are assignments of claims, not contractual performance. Moreover, this case does not involve executory contracts or a "relation of personal confidence." The personal confidence exception does not apply.

¶ 38 Harbour Homes also challenges the validity of the assigned claims in that the assignments were not made "for the payment of money" as it claims is required under RCW 4.08.080.

***288** ¶ 39 Questions of statutory construction are reviewed de novo.[FN47]

FN47. *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.,* 158 Wash.2d 603, 612, 146 P.3d 914 (2006).

¶ 40RCW 4.08.080 provides:

> Action on assigned choses in action.
>
> Any assignee or assignees of any judgment, bond, specialty, book account, or other chose in action, **for the payment of money,** by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, sue and maintain an action or actions in his or her name, against the obligor or obligors, debtor or debtors, named in such judgment, bond, specialty, book account, or other chose in action, notwithstanding the assignor may have an interest in the thing assigned: PROVIDED, That any debtor may plead in defense as many defenses, counterclaims and offsets, whether they be such as have heretofore been denominated legal or equitable, or both, if held by him against the original owner, against the debt assigned, save that no counterclaim or offset shall be pleaded against negotiable paper assigned before due, and where the holder thereof has purchased the same in good faith and for value, and is the owner of all interest therein.[FN48]

FN48. (Emphasis added.)

¶ 41 Harbour Homes insists that the "for the payment of money" clause requires that parties assign their claims "for the payment of money" in order to be valid.

[15] ¶ 42 The supreme court has rejected a reading of the statute that would require consideration "for the payment of money." In *Yamamoto v. Puget Sound Lumber Co.,*[FN49] the court interpreted Rem.1915 Code, section 191, the predecessor to RCW 4.08.080. In examining the same statutory language at issue here,[FN50] the court upheld the validity of assigned claims without a showing of consideration:

FN49. 84 Wash. 411, 146 P. 861 (1915).

FN50. Rem.1915 Code, § 191.

> As to the objection of a want of consideration for the assignments, there was no need of any express consideration. The assignments being in writing, the assignee became vested with the legal title to the claims assigned, and could maintain

an action thereon in his own name, notwithstanding each assignor may have retained an interest in his particular claim.[FN51]

FN51. *Yamamoto,* 84 Wash. at 414, 146 P. 861.

¶ 43 In light of *Yamamoto,* we reject Harbour Homes's argument that the homeowners' assignments were invalid for lack of an express "payment of money."

[16] ¶ 44 In sum, we conclude that the CPA claims are assignable. Several Washington cases have recognized CPA claims brought by assignees.[FN52] Moreover, in light of the generally broad assignability of contracts [FN53] and claims,[FN54] it is significant that Harbour Homes has cited no authority to the contrary.

FN52. *See, e.g., Steinmetz v. Hall-Conway-Jackson, Inc.,* 49 Wash.App. 223, 228-29, 741 P.2d 1054 (1987) (dismissal of an assigned CPA claim at summary judgment reversed and remanded for determination of damages); *Werlinger v. Clarendon Nat. Ins. Co.,* 129 Wash.App. 804, 808-09, 120 P.3d 593 (2005) (assigned CPA claim decided on the mer- its).

FN53. *Berschauer/Phillips,* 124 Wash.2d at 829, 881 P.2d 986(Contracts are assignable unless such assignment is expressly prohibited by statute, contract, or is in contravention of public policy.).

FN54. *Cooper,* 48 Wash.2d at 110, 291 P.2d 657(causes of action are assignable if they would survive to the personal representative of the assignor upon death); RCW 4.20.046 (survival of actions).

[17] ¶ 45 We also conclude that the homeowners' obtained valid assignments of the original purchasers' breach of contract claims. Even general anti-assignment clauses in contracts, aimed at prohibiting the assignment of contractual performance, will not be construed to prohibit assignments of a breach of contract cause of action unless the contract contains specific language to the contrary.[FN55] Here, Harbour Homes has not ***289** shown the assigned claims for breach to be invalid.

FN55. *Berschauer/Phillips,* 124 Wash.2d at 829-30, 881 P.2d 986.

CONSUMER PROTECTION ACT

¶ 46 The homeowners argue that the trial court erred in dismissing their assigned CPA cause of action on summary judgment. We agree.

[18] ¶ 47 In order to maintain a private CPA action, a plaintiff must establish five elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) a causal link between the unfair or deceptive acts and the injury suffered by the plaintiff.[FN56] Only the first and fifth elements are disputed here.

FN56. *Hangman Ridge Training Stables, Inc. v, Safeco Title Ins. Co.,* 105 Wash.2d 778, 780, 719 P.2d 531 (1986); RCW 19.86.020.

[19][20] ¶ 48 The CPA does not define "unfair or deceptive act or practice." Whether an alleged act is unfair or deceptive is a question of law.[FN57] An unfair or deceptive act or practice need not be intended to deceive, it need only have the capacity to deceive a substantial portion of the public.[FN58]

FN57. *Leingang v. Pierce County Medical Bureau,* 131 Wash.2d 133, 150, 930 P.2d 288 (1997); *see also Griffith v. Centex Real Estate Corp.,* 93 Wash.App. 202, 214, 969 P.2d 486 (1998).

FN58. *Hangman Ridge,* 105 Wash.2d at 785, 719 P.2d 531.

¶ 49 The homeowners contend that Harbour Homes engaged in unfair and deceptive practices by making affirmative representations of quality, workmanship, and construction in marketing materials and then failing to provide homes that met the standards as represented. They also contend that Harbour Homes's failure to disclose known defects in the homes constituted unfair or deceptive acts.

¶ 50 Viewing the evidence in the light most favorable to the homeowners, we conclude that this record substantiates that there were "unfair or deceptive acts," the first element of a CPA claim. Harbour Homes provided marketing materials with affirmative representations of quality. It represented that in their homes, "maintenance is kept to a minimum for many years due to the high quality of material and workmanship included in every Harbour Home[ ]"; that "[o]ur goal is to provide each of our home buyers with a home of the highest quality and workmanship ... [ ]"; and that "[d]uring the course of construction, each of our homes is inspected several times by our quality control managers[,]" among others. The record also shows that the homes contained numerous construction deficiencies and that the deficiencies have caused the homes to suffer from excessive deterioration and damage. The deficiencies amount to the builder's failure to properly seal and protect the homes from weather and moisture, resulting in water intrusion, rot, and mold in the homes. The homeowners have made a showing of unfair and deceptive acts under the CPA.

¶ 51 The homeowners also argue that Harbour Homes engaged in unfair or deceptive acts in failing to disclose known defects in the home. We agree.

[21] ¶ 52 A seller's failure to disclose material facts to the purchaser in a real estate transaction may support a CPA claim, even if the circumstances do not establish fraudulent concealment.[FN59] In *Griffith v. Centex Real Estate Corp.*,[FN60] this court recognized a general duty on the part of a seller to disclose facts material to a transaction when the facts are known to the seller but not easily discoverable by the buyer.[FN61] Here, because of the magnitude of the defects in the homes, which have been shown to be results of the original construction, we conclude that these defects are material and not easily discoverable by the purchasers. It is undisputed that Harbour Homes failed to disclose these facts. This failure to disclose constitutes an unfair ***290** and deceptive practice for purposes of the CPA.

FN59. *Nguyen v. Doak Homes,* 140 Wash.App. 726, 734, 167 P.3d 1162 (2007) (citing *Griffith,* 93 Wash.App. at 217, 969 P.2d 486).

FN60. 93 Wash.App. 202, 969 P.2d 486 (1998).

FN61. *Id.* at 214-15, 969 P.2d 486.

¶ 53 Here, Harbour Homes argues that its acts were not unfair or deceptive because the failure to build a quality home is merely an inadequacy in service, citing to *Ramos v. Arnold*[FN62] for support. *Ramos* involved a purchaser's claim against a home appraiser for failing to include defects in the residence in the appraisal report.[FN63] The court held that the claim did not constitute a deceptive act under the CPA, reasoning:

FN62. 141 Wash.App. 11, 169 P.3d 482 (2007).

FN63. *Id.* at 20, 169 P.3d 482.

> The term "trade" as used by the CPA only includes the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided. Entrepreneurial aspects include how the cost of services is determined, billed, and collected and the way a professional obtains, retains, and dismisses clients. Claims directed at the competence of and strategies employed by a professional amount to allegations of negligence and are exempt from the Consumer Protection Act.[FN64]

FN64. *Id.* (citations omitted).

The facts here are distinguishable from *Ramos*. While Harbour Homes attempts to characterize its acts as merely a failure to build quality homes, the record also includes marketing materials with affirmative representations as to the high quality of the homes. The homeowners are not simply challenging the competence of Harbour Homes as a builder, which would go to the substantive quality of services. They also challenge the commercial and entrepreneurial acts of marketing to potential homebuyers with representations of high quality. Additionally, the homeowners, like the plaintiffs in *Griffith,* challenge Harbour Homes's failure to disclose material facts when the builder knew of its purchasers' expectations and knew of defects in its construction.

¶ 54 *Nguyen v. Doak Homes*[FN65] is also distinguishable. There, the court affirmed the dismissal of a second purchaser-occupant's CPA claim where her only evidence of a builder's unfair or deceptive act was a report showing that the builder failed to comply with industry standards.[FN66] But again, the homeowners do not merely claim that Harbour Homes failed to meet industry standards. Their contention is that Harbour Homes's plainly deficient construction, together with its affirmative representations of high quality and workmanship, constitutes an unfair or deceptive act or practice.

FN65. 140 Wash.App. 726, 167 P.3d 1162 (2007).

FN66. *Id.* at 733-34, 167 P.3d 1162.

¶ 55 The homeowners also argue that their CPA claim was improperly dismissed because there was a genuine issue of material fact as to causation. We agree.

[22][23] ¶ 56 To establish the causation element in a CPA claim, a plaintiff must show that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury.[FN67] Proximate cause is a factual question to be decided by the trier of fact.[FN68]

FN67. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wash.2d 59, 84, 170 P.3d 10 (2007).

FN68. *Id.*

[24] ¶ 57 Here, the record includes declarations of three original purchasers who assigned their claims to the appellants. These declarations demonstrate that Harbour Homes represented to the original purchasers that its homes were of highest quality and workmanship, that the purchasers relied on these representations, and that the purchasers would not have purchased the homes if they did not believe Harbour Homes's statements.

¶ 58 Harbour Homes argues that summary judgment was proper because the homeowners have not met their burden to prove that they relied on any assertion of Harbour Homes "because Harbour Homes did not make any assertions to the Subsequent Purchasers." [FN69] But Harbour Homes ignores the ***291** fact that the subsequent homeowners stand in the shoes of the original purchasers as assignees for purposes of the CPA claim in this case.[FN70]

FN69. Brief of Respondent at 22-23.

FN70. *See Puget Sound Nat. Bank,* 123 Wash.2d at 292, 868 P.2d 127.

¶ 59 We conclude that the homeowners have shown genuine issues of material fact for trial on their CPA claim. Summary judgment was improper.

BREACH OF CONTRACT

¶ 60 Finally, the homeowners assert that dismissal of their assigned breach of contract claim was improper. We disagree.

[25][26][27][28] ¶ 61 The basis of the homeowners' claim is breach of the duty of good faith and fair

dealing to each of the homeowners or their assignors. The duty of good faith and fair dealing is implied in every contract.[FN71] This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.[FN72] But the duty of good faith does not "inject substantive terms into the parties' contract." [FN73] Rather, "it requires only that the parties perform in good faith the obligations imposed by their agreement." [FN74] The supreme court has "consistently held there is no 'free-floating' duty of good faith and fair dealing that is unattached to an existing contract." [FN75] The duty exists only in relation to performance of a specific contract term.[FN76]

FN71. *Badgett v. Security State Bank,* 116 Wash.2d 563, 569, 807 P.2d 356 (1991).

FN72. *Id.*

FN73. *Id.*

FN74. *Id.*

FN75. *Keystone Land & Development Co. v. Xerox Corp.,* 152 Wash.2d 171, 177, 94 P.3d 945 (2004).

FN76. *Id.*

[29] ¶ 62 At oral argument, the homeowners represented that Harbour Homes did not perform in good faith in relation to specific contractual terms regarding construction according to certain plans and representations of quality. Nothing in the record substantiates this claim, and this point was not argued to the trial court. Because there is no "free-floating" duty of good faith and fair dealing apart from the terms of an existing contract, the trial court did not err in granting summary judgment as to this claim.

SUMMARY

¶ 63 To summarize, the homeowners hold valid assignments of the claims of those who purchased the residential properties from Harbour Homes. There is no showing by Harbour Homes that the claims are personal or otherwise subject to any bar to assignment.

¶ 64 The rationale of *Stuart* and other cases bars the attempt in this case to allow subsequent purchasers to sue Harbour Homes, the developer. The economic loss rule bars the claim for intentional misrepresentation. The homeowners properly concede they have no claim for negligent misrepresentation against Harbour Homes. This record does not support a claim for breach of good faith and fair dealing.

¶ 65 The assignment of the CPA claim has not been shown to be invalid. There are genuine issues of material fact requiring trial of this claim. We note that this case does not present any public policy or other reasons why CPA claims are not assignable. Accordingly, we limit our discussion to the type of CPA claims alleged in this case.

ATTORNEY FEES

¶ 66 Harbour Homes seeks attorney fees on appeal pursuant to RAPs 14.3 and 18.9(a), arguing that the homeowners' appeal is frivolous. Under RAP 18.9(a), an appellate court may impose sanctions for a frivolous appeal. An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there is no reasonable possibility of reversal.[FN77] Because this standard is not met in this case, this appeal is not frivolous, ***292** and Harbour Homes is not entitled to attorney fees here.

FN77. *State ex rel. Quick-Ruben v. Verharen,* 136 Wash.2d 888, 905, 969 P.2d 64(1998).

¶ 67 We affirm in part, reverse in part, and remand for further proceedings.

WE CONCUR: SCHINDLER, C.J., and LEACH, J.
Wash.App. Div. 1,2008.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ROBERT CARLILE and ANGIE CARLILE, husband and wife and their marital community; et al., Appellants, v. HARBOUR HOMES, INC. f/k/a GEONERCO, INC., a Washington corporation, Respondent.	No. 61419-3-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent, Harbour Homes, has moved for reconsideration of the opinion filed in this case on October 20, 2008. The panel hearing the case has considered the motion and has determined that the motion for reconsideration should be denied. This court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 20th day of November 2008.

FOR THE PANEL:

Cox, J.
Judge

Appendix B